

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUTHELLEN HARRIS, individually  
and as personal representative of  
ROBERT JEAN HARRIS; HEATHER  
HARRIS; JAMIE HARRIS AND GREG  
HARRIS,

Plaintiffs,

v.

COSTCO WHOLESALE CORPORATION and  
WAREHOUSE DEMO SERVICES, INC.,

Defendants.

No. C 10-04626 CW

ORDER DENYING  
DEFENDANTS' MOTION  
TO DISMISS  
PLAINTIFFS' SECOND  
AMENDED COMPLAINT  
(Docket No 75).

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INTRODUCTION

Defendants Costco Wholesale Corporation and Warehouse Demo Services, Inc. move under Rule 12(b)(6) to dismiss Plaintiffs' Second Amended Complaint for failure to state a claim. (Docket No.75). Plaintiffs oppose the motion. Having considered all of the papers filed by the parties, the Court DENIES Defendants' motion to dismiss.

BACKGROUND

On June 5, 2010, Robert Jean Harris (decedent) died after choking on a sample of tri-tip meat allegedly prepared and served to him by Defendants at Costco Wholesale Corporation Store #422 in South San Francisco, California. Pursuant to California Code of Civil Procedure section 377.30, Plaintiff Ruthellen Harris is decedent's personal representative. Plaintiffs Ruthellen Harris, Heather Harris, Jamie Harris, and Greg Harris also proceed individually as decedent's surviving spouse and children. Cal.

1 Civ. Proc. Code § 377.60. Plaintiffs filed a complaint, (Docket  
2 No. 1), which was later amended with leave of the Court (Docket  
3 No. 47). The First Amended Complaint (1AC) was challenged by  
4 Defendants for failure to state a claim and ultimately dismissed  
5 by the Court with leave to amend. (Docket Nos. 50, 52, 53, 57,  
6 72).

7 Plaintiffs then filed a Second Amended Complaint (2AC)  
8 against Defendants Costco Wholesale Corporation and Warehouse Demo  
9 Services, Inc. (Docket No. 74). The 2AC contains five causes of  
10 action: (1) "Wrongful Death - Negligence" against both  
11 Defendants; (2) "Wrongful Death - Products Liability, Negligence"  
12 against both Defendants; (3) "Negligent Retention of an  
13 Independent Contractor" against Costco; (4) "Negligent  
14 Supervision" against Costco; and (5) "Survival Action" against  
15 both Defendants. (Docket No. 74). Defendants moved to dismiss all  
16 claims on the grounds that they had no legal duty to decedent.  
17 (Docket No. 75). Plaintiffs filed a response to the motion and  
18 Defendants filed a joint reply. (Docket Nos. 76, 77).

#### 19 LEGAL STANDARD

20 A complaint must contain a "short and plain statement of the  
21 claim showing that the pleader is entitled to relief." Fed. R.  
22 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to  
23 state a claim, dismissal is appropriate only when the complaint  
24 does not give the defendant fair notice of a legally cognizable  
25 claim and the grounds on which it rests. Bell Atl. Corp. v.  
26 Twombly, 550 U.S. 544, 555 (2007). In considering whether the  
27 complaint is sufficient to state a claim, the court will take all  
28 material allegations as true and construe them in the light most

1 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d  
2 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
3 to legal conclusions; "threadbare recitals of the elements of a  
4 cause of action, supported by mere conclusory statements," are not  
5 taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)  
6 (citing Twombly, 550 U.S. at 555).

#### 7 DISCUSSION

8 All Plaintiffs' claims allege that Defendants "negligently  
9 and carelessly" provided a tri-tip sample measuring between three  
10 and five inches in length in violation of their own policy and  
11 food and hospitality industry custom and practice. 2AC § 33, 34.  
12 Defendants argue that they did not have a legal duty to provide or  
13 serve meat of a particular size.

14 "The threshold element of a cause of action for negligence is  
15 the existence of a duty to use due care." Paz v. State of Cal.,  
16 22 Cal. 4th 550, 559 (2000), citing Bily v. Young & Co., 3 Cal.  
17 4th 370, 397 (1992). Aside from affirmative duties that arise in  
18 the context of special relationships, a person is responsible for  
19 "an injury occasioned to another by his want of ordinary care or  
20 skill in the management of his property or person." Cal. Civ.  
21 Code § 1714(a). "The existence of a legal duty to use reasonable  
22 care in a particular factual situation is a question of law for  
23 the court to decide." Vasquez v. Residential Inv., Inc., 118 Cal.  
24 App. 4th 269, 278 (2004).

25 Exceptions to the general duty to use reasonable care are  
26 determined by balancing public policy factors including the  
27 foreseeability of the harm suffered, the closeness of connection  
28 between the alleged breach and the harm, the certainty of the harm

1 suffered, the moral blame attached to the behavior alleged, the  
2 consequences and burden to the community that would result from  
3 finding a legal duty in the case, and the prevalence of insurance  
4 for the risk involved. Rowland v. Christian, 69 Cal. 2d 108, 112  
5 (1968). In the absence of a statutory provision establishing an  
6 exception to the general duty of care, courts should create one  
7 only where "clearly supported by public policy." Cabral v. Ralphs  
8 Grocery Co., 51 Cal. 4th 764, 772 (2011), quoting Rowland, 69 Cal.  
9 2d at 112; Merrill v. Navegar, 26 Cal. 4th 465, 477 (2001).

10 The 1AC did not clearly define what legal duty Defendants  
11 owed decedent; it used broad terms insufficient to put Defendants  
12 on notice of the claims against them. Moreover, Plaintiffs failed  
13 to include any facts that suggested a breach of the alleged duty,  
14 or any information to support the claim that Defendants even  
15 provided decedent with a meat product.

16 Plaintiffs have cured these defects in the Second Amended  
17 Complaint, asserting Defendants had a duty to use due care when  
18 preparing and serving tri-tip samples for public consumption  
19 without utensils. They did not include several previously named  
20 Defendants who were merely actors in the supply chain and had no  
21 involvement in preparing or serving the meat sample to the public.  
22 Plaintiffs allege a food and hospitality industry custom and  
23 practice that calls for cutting tri-tip into small pieces before  
24 distributing it as samples for consumption. Food providers have a  
25 duty to use due care in the preparation and service of food to the  
26 public. Mexicali Rose v. Superior Court, 1 Cal. 4th 617, 623  
27 (1992), (quoting Mix v. Ingersoll Candy Co., 6 Cal. 2d 674, 680  
28 (1923)).

1 Decedent was allegedly found in close proximity to the table  
2 at which Warehouse Demo Services was providing tri-tip samples to  
3 Costco customers. According to the complaint, a paramedic has  
4 stated that he removed a three to five inch piece of tri-tip from  
5 decedent's throat using forceps, and another witness confirms the  
6 size and type of meat. These additional facts are sufficient to  
7 cure the defects in the previous complaint.

8 CONCLUSION

9 For the forgoing reasons, the motion to dismiss is DENIED.  
10 IT IS SO ORDERED.

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12 Dated: 9/13/2011

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14 CLAUDIA WILKEN  
15 United States District Judge  
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